No. 92-1259

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

HARRIS TRUST AND SAVINGS BANK,
as Trustee of the Sperry Master Retirement Trust No. 2,

Cross-Petitioner,

v.

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Cross-Respondent.

ON CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

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February 22, 1993

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Parties

The parties to the action below were Cross-Respondent John Hancock Mutual Life Insurance Company ("Hancock"); Cross-Petitioner Harris Trust and Savings Bank ("Harris Trust"); counterclaim defendant Chase Manhattan Bank, N.A. ("Chase"), which was succeeded as trustee of the Sperry Master Retirement Trust No. 2 on October 1, 1987, by Harris Trust; and third-party defendants Sperry Corporation ("Sperry") and The Retirement Committee of Sperry Corporation ("Sperry Retirement Committee").

Hancock is a mutual insurance company; it does not have any parent companies or subsidiaries to list pursuant to Rule 29.1.

In 1986, Sperry merged with Burroughs Corporation and became Unisys Corporation ("Unisys"). The Sperry Retirement Committee was succeeded by the Unisys Pension Investment Review Committee. Hancock is informed and believes that shares of Unisys and shares of Chase are publicly traded. Additionally, petitioner is informed and believes that Harris Trust is acting as a party only in its capacity as trustee of the Sperry Master Retirement Trust No. 2 and is not otherwise affected by the outcome of this litigation, and that the Bank of Montreal is a parent of Harris Trust.

Hancock is not aware of any other parent companies or subsidiaries to list pursuant to Rule 29.1.

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BRIEF IN OPPOSITION TO CROSS-PETITION FOR A WRIT OF CERTIORARI

Cross-Respondent John Hancock Mutual Life Insurance Company ("Hancock")[1] submits this brief in opposition to the Cross-Petition for a Writ of Certiorari of Harris Trust and Savings Bank ("Harris Trust"). For the reasons stated herein, the Cross-Petition should be denied.

[1] The opinions of the courts below are reproduced in the Appendix to the Petition for a Writ of Certiorari in Docket No. 92-1074. References to pages of that Appendix are cited herein as "A- ", followed by the page number.

Reasons for Denying the Cross-Petition

Neither question presented by Harris Trust in its Cross-Petition warrants review by this Court. Apart from the question presented by Hancock in its Petition for a Writ of Certiorari in Docket No. 92-1074, the decision of the Second Circuit:

(1) does not conflict with any decision of another court of appeals;

(2) is not inconsistent with ERISA[2] or its legislative history;

(3) is not inconsistent with any interpretation of ERISA published by the Department of Labor (the "DOL"); and

(4) does not involve a novel or innovative interpretation of the statute or existing law.

In addition, it is not necessary for the Court to grant the Cross-Petition in order to consider fully the issues raised by Hancock in its Petition. The question there presented, *viz.*, whether ERISA's fiduciary responsibility provisions apply to any of the assets held by insurance companies in their General Accounts under group annuity contracts that provide for guaranteed benefits, is of fundamental significance to the insurance industry and state insurance regulators.[3] The questions presented by the Cross-Petition, however, raise separate and distinct issues.

Though couched in deceptively ambiguous language, the Cross-Petition in essence seeks review of the following questions:

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[2] Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA").

[3] That question merits review, because the Second Circuit decision, in the one respect in which it reversed the district court, (i) misconstrues ERISA's "guaranteed benefit policy" exception, (ii) directly conflicts with decisions of other courts of appeals, (iii) contradicts 18 years of consistent regulatory interpretation of the statute by the DOL, (iv) has created substantial confusion and uncertainty in the insurance industry, (v) threatens disruption of long-standing insurance company business practices, (vi) ignores Congress' allocation of responsibility for regulating the business of insurance to the States and (vii) unless reversed, will institute a regime of federal regulation of insurance company assets that conflicts with the existing framework of state regulation of insurance.

(1) whether an insurance company should be deemed a fiduciary under ERISA by reason of its exercise of its contract rights under a group annuity contract with a pension plan; and

(2) whether all the assets held by an insurance company in its General Account under a typical group annuity contract like GAC 50 – not just those assets that are "not referable to guaranteed benefits" – are subject to ERISA's fiduciary rules.

Each of these extraordinary propositions was rejected by the court below, is inconsistent with ERISA and its legislative history, and has thus far found no support in any judicial decision. The questions in the Cross-Petition, therefore, do not merit this Court's review.

I.

THE CONTENTION THAT HANCOCK SHOULD BE DEEMED A FIDUCIARY UNDER ERISA WITH RESPECT TO GAC 50 ITSELF DOES NOT MERIT REVIEW

Harris Trust argues that Hancock must comply with ERISA's fiduciary standards even when exercising its own contract rights under GAC 50, on the theory that the contract is a "plan asset" and that Hancock has "broad and unfettered discretion to alter Harris Trust's rights" under GAC 50. Cross-Petition at 8. It contends, therefore, that Hancock, even in exercising its own rights under the contract, must act exclusively for the benefit of the Plan.

Affirming the district court, the Second Circuit held that, while the contract itself is a "plan asset," Hancock is not a fiduciary in relation to the contract *qua* contract:

> The policy itself, with its bundle of contractual rights and responsibilities, therefore is similar to any other financial instrument owned by an employee benefit plan. Hancock is not a fiduciary in regard to the policy here, however, because it does not 'exercise[ ] any discretionary authority or discretionary control . . . respecting management or disposition of' the policy itself. 29 U.S.C. § 1002(21)(A). Only Harris Trust as

> contractholder has discretionary authority over the guaranteed benefit policy *qua* policy.

(A-13)* The court concluded that Hancock "has no fiduciary responsibility in regard to the undivided policy" (A-14).

Contrary to Harris Trust's assertion in its Cross-Petition, the Second Circuit's decision on this issue is not in conflict with the decisions of the Seventh Circuit or of any other circuit court. Rather, its decision on this point has broad judicial support and does not change existing law.

A. *There Is No Conflict Between the Second Circuit's Decision and the Decisions of Other Circuit Courts.*

The Cross-Petition is predicated upon a supposed conflict between the decision below and two decisions of the Seventh Circuit, *Ed Miniat, Inc. v. Globe Life Ins. Group, Inc.*, 805 F.2d 732 (7th Cir. 1986), *cert. denied*, 482 U.S. 915 (1987), and *Chicago Bd. Options Exchange, Inc. v. Connecticut Gen'l Life Ins. Co.*, 713 F.2d 254 (7th Cir. 1983) ("*CBOE*"). The Second Circuit properly found, however, that *Miniat* and *CBOE* are inapposite (A-14). Moreover, even cursory analysis of *Miniat* and *CBOE* shows that neither supports the broad proposition advanced by Harris Trust, *viz.*, that ERISA's fiduciary rules apply to an insurance company's exercise of its rights under the contract.

In both *Miniat* and *CBOE*, the insurance company defendant allegedly had exercised a unilateral right to alter a critical

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* The Second Circuit found clear support for its conclusion in ERISA's legislative history. The Joint Explanatory Statement of the Committee on Conference had noted:

> A trust is not to be required in the case of plan assets which consist of insurance (including annuity) contracts or policies issued by an insurance company qualified to do business in a State (or the District of Columbia) . . . . Although these contracts need not be held in trust, nevertheless, *the person who holds the contract is to be a fiduciary and is to act in accordance with the fiduciary rules . . . with respect to these contracts.*

H.R. Rep. No. 1280, 93d Cong., 2d Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 5038, 5079 (emphasis added).

contract term that resulted in severe prejudice to the contractholder.[5] Neither decision is on point, because, as the Second Circuit found, under GAC 50, Hancock "can act only under the terms of the policy, and any change in the policy requires the consent of the contractholder" (A-14). Both the Second Circuit and the district court concluded that Hancock did not alter any terms of the contract but merely "exercised its express rights under the contract" (A-14).[6] Whether or not *Miniat* and *CBOE* are correct applications of ERISA to the facts of those cases, they are not germane to the facts in this case.

In any event, *Miniat* and *CBOE* do not support the broad proposition advanced by Harris Trust that an insurer should be deemed a fiduciary when it performs in accordance with the specific terms of a contract. Indeed, the Seventh Circuit has itself

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[5] In *CBOE*, the insurer allegedly amended provisions of the contract unilaterally with the effect of deferring for a ten-year period the right the contractholder theretofore had to withdraw or transfer funds under the contract, thereby altering the contract in a way that "lock[ed] CBOE into the [contract] for the next 10 years . . . [and] determined what type of investment the Plan must make." 713 F.2d at 260. Similarly, in *Miniat*, in reversing a dismissal on the pleadings on the strength of an allegation that the defendant "'unilaterally . . . announced a withdrawal from the [Retirement Life Reserve] insurance business and an abandonment of existing policy holders, by reducing the rate of return paid on account from 10% to 7% to 4% per annum by November 1, 1983, and increasing premium rates to the maximum allowed by the policy,'" 805 F.2d at 734, the Seventh Circuit held that "plaintiff *may* be able to prove that [defendant] is a fiduciary," *id.* at 738 (emphasis added).

[6] With regard to the specific conduct challenged by Harris Trust (Cross-Petition at 8), the district court found in *Harris II*, on the undisputed facts before it, that Hancock's conduct was consistent with both the terms of the contract and state law and granted summary judgment dismissing all such claims. The district court held that Hancock had no contract obligation whatsoever to continue to make available the so-called "rollover" arrangement (A-67 to A-71); Harris Trust did not appeal from the dismissal of that claim. Next, the district court held that Hancock had the express right under the contract to terminate so-called "non-guaranteed benefit" payments (A-71 to A-77); on appeal, the Second Circuit affirmed (A-16 to A-18). Finally, the district court found that Hancock performed the allocation of investment income and expenses in accordance with the contract's terms, *viz.*, on a company-wide basis pursuant to procedures approved by the New York State Insurance Department (A-83 to A-85); Harris Trust did not appeal from the dismissal of that claim.

ruled that in those circumstances an insurer does not have an ERISA fiduciary duty. *See Schulist v. Blue Cross of Iowa*, 717 F.2d 1127 (7th Cir. 1983). As the Seventh Circuit explained in *Miniat*:

> *Schulist* stands for the proposition that if a specific term (not a grant of power to change terms) is bargained for at arm's length, adherence to that term is not a breach of fiduciary duty. No discretion is exercised when an insurer merely adheres to a specific contract term.

805 F.2d at 737. *See also Associates in Adolescent Psychiatry, S.C. v. Home Life Ins. Co.*, 941 F.2d 561, 569 (7th Cir. 1991) (*CBOE* "held that an insurer's authority to amend the terms of an annuity contract purchased to fund a retirement plan makes it a fiduciary under 29 U.S.C. § 1002(21)(A)"), *cert. denied*, 112 S. Ct. 1182 (1992). Harris Trust has been unable to cite any authority in the Seventh Circuit or any other circuit that holds to the contrary.

To obscure its patent lack of any supporting authority, Harris Trust suggests that this case involves an insurer's exercise of discretion that "alters the pension plan's rights under the contract or the value of the contract to the plan." Cross-Petition at 3. The conduct challenged by Harris Trust, however, does not involve an alteration of the terms of GAC 50 but rather actions consistent with the terms of the contract.[7] As the court below held, none of these actions could be construed as altering or amending any of Harris Trust's rights under the contract or involved "a grant of power to change terms." These actions merely reflected an exercise by Hancock of its "express rights under the contract" (A-14), and there is no authority in any circuit that holds that the exercise of such rights implicates ERISA fiduciary duties.[8]

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[7] *See supra* note 5.

[8] Harris Trust also argues that Hancock's exercise of its contract rights constitutes an increase in Hancock's "compensation." Cross-Petition at 11. Hancock disputes that characterization as a factual matter, and there is no support for such a conclusion in the record. In any event, as the Seventh Circuit noted in *Schulist*, adherence to the contract, even in matters of compensation, does not render an insurer a fiduciary. 717 F.2d at 1132. Harris Trust cites *F.H. Krear & Co. v. Nineteen Named Trustees*, 810 F.2d 1250, 1259 (2d Cir. 1987), to support

(Footnote continued)

B. *Harris Trust's Contention Is in Conflict with Numerous Decisions in Other Circuits.*

Harris Trust also seeks review on the ground that the decision below changes existing law and "has opened an enormous gap in the protections afforded by ERISA's fiduciary rules." Cross-Petition at 7. On the contrary, the Second Circuit's decision is consistent with a substantial body of judicial authority that holds that ERISA was not intended to place a person dealing with a pension plan in the position of having conflicting obligations.

Harris Trust's theory, if adopted, would have profound implications for insurance company operations. A General Account contract like GAC 50 typically affords the insurer a variety of contract rights to which the contractholder has expressly agreed. Those rights are specifically set forth in the contract and are designed to benefit not just the insurer but all its other General Account contractholders. For example, GAC 50, as well as Hancock's other participating group annuity contracts, requires that Hancock employ company-wide procedures, such as income and expense allocations and dividend formulae, that simultaneously affect thousands of contracts backed by the General Account. Hancock is obligated, of course, both under contract terms and by an extensive body of state laws and regulations, to establish those procedures and apply them in a manner that is nondiscriminatory as to pension plan and non-pension plan customers alike. If, as Harris Trust contends, an insurer's conduct is to be governed by ERISA's "solely in the interest of" standard when it executes such procedures, it would be subjected to irreconcilably conflicting duties.

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its argument. *Krear* is of no help to Harris Trust, however, because that case held that the defendants were *not* ERISA fiduciaries, inasmuch as they had no fiduciary responsibilities in fixing the terms of an agreement with the pension plan involved, including the terms relating to their compensation. *Id. Krear* noted, in *dictum*, that a party to a contract *may* have such control over factors that affect its compensation, like the percentage of claims paid, so as to become a fiduciary with respect to compensation. *Id. Krear* did not suggest, however, that a party to a contract would become a fiduciary under ERISA whenever it had discretion in connection with the exercise of its contract rights.

The courts in a number of circuits have held that Congress did not intend to impose ERISA's fiduciary duties in a manner that would create conflicting obligations.[9] In *Useden v. Acker*, for example, the Eleventh Circuit, rejecting a claim that a commercial lender to a plan acts as a fiduciary in exercising its rights under the loan agreement, recognized that such conduct, while affecting the interests of the plan, also affects the interests of the lender's shareholders and depositors:

> We cannot agree with appellant's claim that the bank's mere exercise of its contractual rights made the bank an alter ego of the named Plan fiduciaries. . . .
>
> To accept appellant's theory would subject any commercial lender acting within ordinary commercial custom to inconsistent obligations. On the one hand, a bank's duty to its shareholders and depositors would demand that it enter into only those agreements which accord it sufficiently exacting security rights. On the other hand, a bank's resulting fiduciary duty to the plan-borrower would irreconcilably preclude its exercise of those crucial rights.

947 F.2d 1563, 1575 (11th Cir. 1991), *petition for cert. filed sub nom. Useden v. Greenberg Traurig Hoffman Lipoff Rosen & Quentel*, 60 U.S.L.W. 3843 (U.S. June 1, 1992) (No. 91-1944).[10] The reasoning of *Useden* and of these other cases applies with equal force here.

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[9] *See, e.g., Levy v. Lewis*, 635 F.2d 960 (2d Cir. 1980); *United Indep. Flight Officers, Inc. v. United Air Lines, Inc.*, 756 F.2d 1262, 1268 (7th Cir. 1985); *see also Hagan v. Kaiser Aluminum & Chem. Corp.*, 668 F. Supp. 1298, 1301 (E.D. Mo. 1987); *Amato v. Western Union Int'l, Inc.*, 596 F. Supp. 963, 968 (S.D.N.Y. 1984), *aff'd in part, rev'd in part*, 773 F.2d 1402 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113 (1986); *Sutton v. Weirton Steel Div. of Nat'l Steel Corp.*, 567 F. Supp. 1184, 1201 (N.D. W. Va.), *aff'd*, 724 F.2d 406 (4th Cir. 1983), *cert. denied*, 467 U.S. 1205 (1984).

[10] The questions presented in the pending Petition for Writ of Certiorari in *Useden* do not affect the proposition for which that case is cited here. Those questions concern whether ERISA authorizes a monetary remedy against a non-fiduciary who knowingly participates in a fiduciary's breach of duty. *See* 61 U.S.L.W. 3093 (U.S. Aug. 11, 1992).

An insurer does not act in a fiduciary capacity when it exercises its rights under a General Account group annuity contract, because it cannot act "solely in the interest of" any one contractholder without simultaneously breaching its obligations to its other contractholders. The Second Circuit's holding merely confirmed the conclusion reached by all the other courts that have considered this issue.

II.

THE CONTENTION THAT HANCOCK IS SUBJECT TO ERISA FIDUCIARY DUTIES WITH RESPECT TO ALL THE ASSETS HELD UNDER GAC 50 DOES NOT MERIT REVIEW

Having persuaded the court below that Hancock should be subject to ERISA fiduciary duties with regard to the "free funds" under GAC 50, Harris Trust now claims that the Second Circuit "did not go far enough." Cross-Petition at 12. It contends that the Second Circuit should have held that Hancock is a fiduciary with regard to all the assets under GAC 50. Cross-Petition at 3. Despite Harris Trust's assertions to the contrary, no circuit court has gone that far. There is no conflict, therefore, and no other reason why this Court should grant review.

A. *The Second Circuit's Decision Does Not Conflict with the Decision of Any Other Circuit Court.*

The Second Circuit rejected Harris Trust's contention that Hancock should be considered a fiduciary with respect to all the assets held under GAC 50. Rather, it found that "Hancock provides guarantees with respect to one portion of the benefits derived from the contract" (A-8 to A-9) and that,

> *at least to the extent it provides for benefits guaranteed by Hancock, GAC 50 is a guaranteed benefit policy* and Hancock does not act as a fiduciary in administering it.

(A-8) (emphasis added). Contrary to Harris Trust's contention, that determination is not inconsistent with the opinions in *Peoria Union Stock Yards Co. Ret. Plan v. Penn Mut. Life Ins. Co.*,

698 F.2d 320 (7th Cir. 1983), and *Jacobson v. John Hancock Mut. Life Ins. Co.*, 662 F. Supp. 1103, *withdrawn, set aside & vacated*, 662 F. Supp. 1112 (D. Conn. 1987), the two decisions ostensibly in conflict with the decision below.[11] In any event, the opinions in *Peoria Union* and *Jacobson* are of limited precedential value, as even the courts that issued them recognized.

Peoria Union involved a contract which the Seventh Circuit described, on the basis of the pleadings before it, as one that (unlike GAC 50) did not provide guarantees with respect to any of the benefits derived from the contract.[12] Instead, the contract was said to involve a so-called "accumulation phase" during which the insurer did not guarantee any benefits. 698 F.2d at 327. As described by the Seventh Circuit, the employer could use funds accumulated in that phase to purchase annuities from the defendant insurance company or withdraw them to purchase the annuities from another insurer. *Id.* at 322. The employer had in fact withdrawn funds to purchase annuities on behalf of retired employees. *Id.* at 323.

The sole issue considered in *Peoria Union* was whether the "guaranteed benefit policy" exception applied to the funds held by the insurer during the "accumulation phase." It did not address whether the exception applied in any respect to benefits guaranteed under the contract or to the annuities purchased with funds withdrawn from the contract.

While the Second Circuit found that GAC 50 has at all times had "free funds," *i.e.*, assets that the court characterized as "not referable to guaranteed benefits," it is undisputed that GAC 50

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[11] *Peoria Union* and *Jacobson*, to the extent that they hold that an insurance company has any fiduciary duty with respect to a General Account contract that provides for guaranteed benefits, are substantively incorrect for the reasons stated in *Mack Boring and Parts Corp. v. Meeker Sharkey Moffitt*, 930 F.2d 267 (3d Cir. 1991), and urged by Hancock in its Petition in Docket No. 92-1074.

[12] *Peoria Union* involved an appeal from the district court's dismissal of the complaint on the ground that it did not state a claim for relief under ERISA. 698 F.2d at 328. The Seventh Circuit reversed, holding that a claim for ERISA had been stated. *Id.* at 327.

also contained substantial assets supporting guaranteed benefits (A-8).[13] *Peoria Union* does not conflict with the decision below, therefore, because it does not address ERISA's applicability to that portion of a group annuity contract that supports guaranteed benefits.[14]

Harris Trust's argument, to the extent that it relies upon *Peoria Union*, fails for other reasons as well. Upon motion for rehearing, the Seventh Circuit expressly acknowledged the limited nature of its opinion, which "merely reverse[d] the dismissal of the complaint," and it reserved judgment on a "number of arguments" concerning ERISA's applicability that the court had not considered. 698 F.2d at 328. The Seventh Circuit's candid statement that its opinion should not be regarded as dispositive of ERISA's applicability to the contract at issue diminishes whatever precedential value it might otherwise have.

For similar reasons, *Jacobson*, a district court decision within the Second Circuit, does not support Harris Trust's contention. Like *Peoria Union*, *Jacobson* involved the question whether the insurance company defendant — Hancock — was an ERISA fiduciary with respect to assets held under a group annuity contract that were not associated with guaranteed benefits.

Jacobson did not, as Harris Trust asserts, hold that "Hancock was an ERISA fiduciary as to all of the funds held under the

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[13] In its Brief in Opposition to Petition for a Writ of Certiorari ("Opposition Brief") in Docket No. 92-1074, Harris Trust acknowledged that "Hancock provides guarantees with respect to one portion of the benefits derived from the contract." Opposition Brief at 3.

[14] Harris Trust conceded as much in its Opposition Brief in Docket No. 92-1074. There, it stated:

> In *Peoria Union Stock Yards Co. Retirement Plan v. Penn Mut. Life Ins. Co.*, 698 F.2d 320, 327 (7th Cir. 1983), the Seventh Circuit recognized that group annuity contracts such as GAC 50 can be divided into guaranteed and non-guaranteed aspects for purposes of an ERISA analysis. In *Peoria*, the Seventh Circuit concluded that the non-guaranteed portion of the contract was governed by ERISA.

Opposition Brief at 5.

contract." Cross-Petition at 17. Quite the opposite: *Jacobson* held that the "guaranteed benefit policy" exception covers "that phase of a contract in which the obligation of the insurer to guarantee the benefits payable to plan participants is fixed." 662 F. Supp. at 1108. Thus, *Jacobson* is flatly contrary to Harris Trust's argument.[15]

Jacobson lacks significance for other reasons as well. To begin with, *Jacobson* is only a decision of a district court within the Second Circuit. The law of the Second Circuit is expressed in the decision below, not in *Jacobson*. *Jacobson* cannot properly be used, therefore, to support Harris Trust's claim that there is a "conflict" between the circuits. Finally, the *Jacobson* decision lacks any precedential value, because it was subsequently withdrawn and vacated by the district court.[16]

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[15] Harris Trust correctly characterized *Jacobson* in its Opposition Brief in Docket No. 92-1074:

> The principles articulated in *Peoria* have also been applied in the context of a contract nearly identical to GAC 50. *Jacobson v. John Hancock Mut. Life Ins. Co.*, 655 F. Supp. 1290, withdrawn pursuant to settlement, 662 F. Supp. 1103, 1112-13 (D. Conn. 1987). In *Jacobson*, the pension plan trustees alleged and the Court held that Hancock was an ERISA fiduciary with respect to funds held under a contract *which were not associated with guaranteed benefits.*

Opposition Brief at 6 (emphasis added).

[16] In entering its order vacating its prior decision, the district court noted that "there are genuine issues with respect to whether, in enacting ERISA, Congress intended that insurance companies be deemed to be fiduciaries, as defined by ERISA, with respect to assets contributed pursuant to group annuity contracts and held in their general investment accounts . . . ." 662 F. Supp. at 1113. The district court directed that its previous decision,

> together with the findings and conclusions therein, [be] withdrawn, set aside and vacated, and shall be of no force or effect for use against defendant, its successors and assigns, by plaintiffs, by the Pension Fund or by third parties, for collateral estoppel or other preclusive purposes. . . .

Id.

B. *Harris Trust's Contention Is Wholly at Variance with the "Guaranteed Benefit Policy" Exception.*

Harris Trust argues that the Second Circuit's decision misconstrues ERISA's "guaranteed benefit policy" exception. The Second Circuit expressly found that "Hancock provides guarantees with respect to one portion of the benefits derived from the contract" (A-8 to A-9) and that, "at least to the extent it provides for benefits guaranteed by Hancock, GAC 50 is a guaranteed benefit policy" (A-8). Harris Trust contends, however, that the "crucial question" governing the applicability of the exception "is whether the availability of funds for benefits is dependent upon Hancock's success or failure as an investor." Cross-Petition at 14. That contention, of course, is totally divorced from the language of the exception, which states that a "guaranteed benefit policy" is "an insurance policy or contract to the extent that such policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B).[17]

The proposition urged by Harris Trust in its Cross-Petition, if adopted by this Court, would eviscerate the "guaranteed benefit policy" exception.[18] Virtually all General Account group

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[17] Harris Trust also argues that Hancock is a fiduciary with respect to all the funds held under GAC 50 since "Hancock has chosen to commingle assets backing its guarantees with those representing free funds." Cross-Petition at 15. That argument lacks any factual basis: Hancock has not "chosen to commingle" any assets. Quite the contrary, as is clear in the record, GAC 50 expressly requires that the premiums received by Hancock be placed in Hancock's General Account (A-4).

[18] Harris Trust also urges that GAC 50 does not come within the "guaranteed benefit policy" exception, because, in its view, GAC 50 is not an "insurance policy or contract" within the meaning of 29 U.S.C. § 1101(b)(2)(B), under tests that Harris Trust would import from cases construing the federal securities laws. Cross-Petition at 20. That issue was put to rest by the district court on the basis of the undisputed facts discussed at length in *Harris I* (A-53 to A-56), and the Second Circuit did not disturb those findings. Moreover, the tests urged by Harris Trust have no application to an analysis of the "guaranteed benefit policy" exception. In effect, Harris Trust

(Footnote continued)

annuity contracts provide for some form of participation in the General Account's investment experience, through, for example, the payment of a dividend. Every such participating contract will at times have associated with it what Harris Trust calls "free funds." Under the construction urged by Harris Trust, no such participating contract would ever qualify under ERISA as a "guaranteed benefit policy," even to the extent of guaranteed benefits. There is no support for such a result under the statute, its legislative or administrative history,[19] or any judicial precedent.

Harris Trust's contention that Hancock should be subject to ERISA fiduciary duties with respect to all the assets held under GAC 50 – despite the fact that the contract has at all times provided substantial guaranteed benefits to plan participants – is contrary to the language of the statute and without any judicial support. The Cross-Petition fails, therefore, to present any colorable basis for review.

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would have this Court engraft onto ERISA a prerequisite test for what constitutes "insurance" that is not required by the terms of § 1101(b)(2)(B).

[19] Harris Trust purports to rely upon two DOL advisory opinions, Advisory Opinions 78-8A (Mar. 13, 1978) and 83-51A (Sept. 21, 1983), to suggest that the DOL would consider the extent to which "investments" are guaranteed in determining whether a General Account contract is a guaranteed benefit policy. Cross-Petition at 19-20. As Hancock's Petition in Docket No. 92-1074 points out, however, these opinions address separate account, not General Account, contracts. Petition at 15. Moreover, as the district court noted in *Harris I*, they are merely advisory opinions that, under ERISA, may be relied upon only by the party submitting the request for an opinion and only to the extent the actual situation conforms to that described in the request (A-60).

Conclusion

For all the foregoing reasons, the Court should deny Harris Trust's Cross-Petition for a Writ of Certiorari.

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Respectfully submitted,

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